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In The Matter of Date Issued:
December 8, 1993

TEH K. HU Case No.: 93-ERA-38

Complainant
v.

PUBLIC SERVICE ELECTRIC
AND GAS COMPANY

Respondent
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APPEARANCES : Teh K. Hu
Pro Se

Robert R. Rader, Esq.
For the Respondent

Before: NICODEMO DE GREGORIO
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises under the employee protection provision of the Energy Reorganization Act of 1974, as amended, 42 U.S.C. §5851 (hereinafter "ERA"), and its implementing regulations, found at 29 C.F.R. Part 24 (1990). Section 210 of the ERA prohibits covered employers from discriminating against any employee with respect to terms, conditions, or privileges of employment because the employee assisted or participated, or is about to assist or participate in any manner in any action to carry out the purposes of the Energy Reorganization Act or the Atomic Energy Act of 1954, as amended.

PROCEDURAL HISTORY

Mr. Hu, Complainant, was employed by Public Service Electric & Gas Company (hereinafter "PSE & G"), Respondent, as a simulator

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software engineer until his termination on April 26, 1991. Mr. Hu filed a complaint with the Department of Labor Wage and Hour Division on May 24, 1991 alleging numerous grounds of discrimination. The Department of Labor (hereinafter "DOL") transferred this complaint to the U.S. Equal Employment Opportunity Commission (hereinafter "EEOC"). The EEOC heard Mr. Hu's case insofar as it dealt with his allegations of race, national origin, and age discrimination under Title VII. *See* 42 U.S.C. §2000a *et seq*. The EEOC's final determination in May 1993 was that PSE & G did not violate Title VII by terminating Mr. Hu. On May 14, 1993 Mr. Hu filed another complaint with the Department of Labor Wage and Hour Division because his allegation of discrimination under §210 of the Energy Reorganization Act had not been heard by either agency. This complaint was referred to the Office of Administrative Law Judges for a hearing. A formal hearing on the record was held in Wilmington, Delaware on August 3 through 5, 1993. Post-hearing briefs with findings of fact, and conclusions of law were received from Respondent on September 27, 1993, and from Complainant on October 7, 1993. Additional post-hearing submissions from Mr. Hu dated October 27, November 16, and November 18, and from PSE & G dated November 9, 1993 were not considered because they were untimely. PSE & G's December 1, 1993 objection to Mr. Hu's post-hearing submissions is therefore moot.

Respondent filed a motion on September 27, 1993 to Reopen the Record to Submit New and Material Evidence Not Previously Available. Respondent's Motion contained two exhibits: (1) an affidavit from Dianna I. Schley, which respondent alleges demonstrates that the complainant did not discuss §210 claims with the EEOC, and (2) a letter dated May 12, 1993 from the EEOC Chairman to Mr. Hu, which respondent alleges is not the EEOC's "final determination," but rather reiterates that the EEOC was not changing its earlier, final Determination of May 8, 1992.

Respondent's Motion is denied because these exhibits are cumulative. (*See* Cl. Ex. G).

STATEMENT OF THE CASE

PSE & G is a licensee of the Nuclear Regulatory Commission (hereinafter "NRC"). PSE & G operates two nuclear power plants in Salem, New Jersey. PSE & G also operates a simulator for each power plant (hereinafter "Salem Simulator" and "Hope Creek Simulator"). The simulators, which are also located in Salem,

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New Jersey, replicate the responses received in the control room of the nuclear facility they simulate. The simulators reproduce actual plant conditions in order to train the nuclear power plant operators. (Tr. at 237). Therefore, PSE & G's software engineers create simulated malfunctions, which require the plant

operators to determine the type and cause of the malfunction, and to utilize the appropriate operating procedures to respond. (Tr. at 237-238).

Mr. Hu received a Ph. D. in nuclear engineering from the University of Oklahoma in 1973. (Tr. at 40). On April 10, 1989 Mr. Hu began full-time employment with PSE & G as a simulator software engineer at the Salem Simulator. (Tr. at 49). Mr. Hu's first experience working as a simulator software engineer was for PSE & G. (Tr. at 40-48). Prior to being employed by PSE & G, Mr. Hu performed quality control work for Branch Radiographic Laboratory at the Indian Point 3 nuclear power plant for eighteen months (Tr. at 41-42); he was employed as a staff engineer writing system training manuals for General Physics Corporation for eighteen months (Tr. at 43-44); and he had worked for Systems Technology Laboratory on a project study of the transportation of nuclear fuel for three months. (Tr. at 44). After that, Mr. Hu had worked for Bechtel Power Corporation from 1979 through 1988. At Bechtel, Mr. Hu worked in the Start-Up Department, then transferred to Nuclear Engineering, and also worked on dose rate analysis. (Tr. at 44-48).

At the Salem Simulator, Mr. Nguyen, the lead software engineer, was assigned to act as a mentor and trainer for Mr. Hu. (Tr. at 251). In addition to Mr. Nguyen and Mr. Hu having some interpersonal difficulties (Tr. at 254-255), Mr. Nguyen was not pleased with Mr. Hu's work performance. (Tr. at 469-475). Mr. Hu explained that the reason why he had some difficulty doing the work assigned to him was because he felt that the summary language of the computer program was difficult to understand and figure out (Tr. at 61), and because he believed that errors existed in the computer program. (Tr. at 58). After working at the Salem Simulator for approximately three months, Mr. Zambuto, the principal trainer and manager of the training center, asked Mr. Hu to transfer to the Hope Creek Simulator. According to Mr. Zambuto and Mr. Mecchi, the principal trainer for operations, the Hope Creek Simulator had better documentation and was slower paced compared to the Salem Simulator. (Tr. at 328-329, 253-254). Mr. Hu worked at the Hope Creek Simulator until April 26, 1991 when he was terminated.

After Mr. Hu was transferred to the Hope Creek Simulator, he

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expressed what he characterized as "quality and safety concerns" to Mr. Huth, the lead software engineer. (Tr. at 63-64). Sometime thereafter, Mr. Hu expressed his concerns to Mr. Zambuto.

When Mr. Hu was transferred to the Hope Creek Simulator, Mr. Mecchi arranged for a Senior Software Engineer employed by Singer-Link to work with Mr. Hu to help familiarize him with the Hope Creek Simulator's operating system. (Tr. at 151, 258). This one-on-one assistance had never been given to any other PSE & G software engineer. (Tr. at 258). Mr. Hu was trained by the Senior Software Engineer for about five to seven business days

(Tr. at 333), at a cost of approximately seventy dollars an hour to PSE & G. (Tr. at 258-259). Mr. Hu also attended the training courses that were ordinarily assigned to entry level software engineers. (Tr. at 334-335).

In May 1990 Mr. Hu had his first year appraisal, which covered the period from July 1989 to April 1990. (R. Ex. 6). For every category that was filled in, Mr. Hu's work performance was rated "needs development." (R. Ex. 6). Beginning in June 1990 until his termination, Mr. Hu was required to fill out weekly and bi-weekly self assessment sheets. (R. Ex. 19, Tr. at 367-369). In October 1990, Mr. Hu had his second year appraisal which covered the period from May 1990 to September 1990. (R. Ex. 9). Although Mr. Hu received a "meets standard" evaluation for two categories, the other categories indicated "needs development" as well as "below standard" ratings. (R. Ex. 9). In a letter dated October 8, 1990, Mr. Hu was notified that he was being placed in a six-month performance improvement plan (hereinafter "PIP") effective October 15, 1990. (R. Ex. 10).

Three months later, on January 11, 1991, a panel meeting was held to discuss Mr. Hu's unsatisfactory performance in the PIP. (Cl. Ex. A Enclosure 9). Mr. Zambuto, Mr. Huth, Mr. Mecchi, Mr. Saravalo, and Mr. Hu attended this meeting. (Cl. Ex. A Enclosure 9, Tr. at 318, 423). At this meeting Mr. Hu raised the same concerns he had previously raised with Mr. Huth and Mr. Zambuto. (Tr. at 424, Cl. Ex. 1).

A couple of weeks after the panel meeting, Mr. Zambuto rejected Mr. Hu's request to go to Ft. Lauderdale, Florida for a computer training program. (Cl. Ex. 1). Shortly thereafter, on February 21, 1991, Mr. Hu was notified that he would not receive a salary increase. (Cl. Ex. B). On April 22, 1991 Mr. Hu overheard Mr. Zambuto say "if you don't like him, abuse him, and ship him out." (Cl. Ex. A). Four days later, Mr. Hu was

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terminated from PSE & G.

On April 29, 1991, Mr. Hu telephoned the NRC to report the concerns he raised with his superiors at PSE & G. (Cl. Ex. 1). On April 30, 1991, Mr. Hu requested PSE & G's Human Resources Department to investigate the reasons for his termination. The Human Resources Department concluded that Mr. Hu's allegation of discrimination was without merit, and that his separation from PSE & G was based solely on issues surrounding his performance. (Cl. Ex. A Enclosure 8). On May 28, 1991, Mr. Hu requested that PSE & G take another look at his case. (Cl. Ex. A Enclosure 9). Thereafter, on July 17, 1991 a meeting was held pursuant to the Employee Relations Review Procedure where Mr. Hu was given an opportunity to substantiate his claim that his separation from PSE & G was improper. (Cl. Ex. A Enclosure 13, 15). The Vice President of Nuclear Operations concluded that:

> A review of your employment record reveals that you failed to meet the performance expectations of your position, and you were ultimately placed on a formal performance

improvement plan. Having reviewed that plan along with your performance appraisals, as well as consideration of your comments of July 17, I find no evidence to support your assertion that your separation was motivated by factors unrelated to performance based criteria.

(Cl. Ex. A Enclosure 15).

ISSUES

There are three issues to be decided in this case:

(1) whether or not Mr. Hu's complaint was timely filed;

(2) whether or not Mr. Hu engaged in activities protected by the ERA; and

(3) if Mr. Hu engaged in activities that are protected by the ERA, were the adverse employment actions taken by PSE & G motivated by Mr. Hu's protected activities.

STATUTE OF LIMITATIONS

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On April 26, 1991, when Mr. Hu's employment at PSE & G was terminated, the applicable law required that a complaint filed under the employee protection provision of the Energy Reorganization Act of 1974, as amended, be filed within thirty days of the date of the alleged retaliatory personnel action:

> Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of subsection (a) of this section may, within thirty days after such violation occurs, file (or have any person file on his behalf) a complaint with the Secretary of Labor . . . alleging such discharge or discrimination.

42 U.S.C. §5851(b)(1).

PSE & G argues that Mr. Hu's complaint is barred by the Statute of Limitations. Mr. Hu filed two complaints with the DOL, one on May 24, 1991, and another one on May 14, 1993. The crux of PSE & G's argument is that Mr. Hu's May 24, 1991 complaint did not set out a claim of discrimination on the basis of protected activities under the ERA, and thus the complaint that resulted in this hearing was the one Mr. Hu filed on May 14, 1993. If this is true, Mr. Hu's complaint is clearly barred by the Statute of Limitations because more than two years has elapsed since Mr. Hu's April 26, 1991 termination.

I find that Mr. Hu's complaint is not barred by the Statute

of Limitations because Mr. Hu's May 24, 1991 complaint set forth a complaint of discrimination on the basis of protected activities. As such, it was concededly timely filed with the DOL. (Tr. at 201).

Although Mr. Hu's complaint was not artfully drafted, the DOL should have been aware that he was alleging a violation of the ERA. On the first line of Mr. Hu's complaint he cited 10 C.F.R. §50.7(b) as the regulation under which he was filing his claim. This regulation states, in pertinent part:

> Any employee who believes that he or she has been discharged or otherwise discriminated against by any person for engaging in the protected activities specified in paragraph (a)(1) of this section may seek a remedy for the discharge or discrimination through an administrative proceeding in the Department of Labor.

10 C.F.R. §50.7(b). Paragraph (a) of 10 C.F.R. §50.7 states, in pertinent part:

> The protected activities are established in section 210 of the Energy Reorganization Act of 1974, as amended, and in general are related to the administration or enforcement of a requirement imposed under the Atomic Energy Act or the Energy Reorganization Act.

10 C.F.R. §50(a). In addition to citing 10 C.F.R. §50.7(b), Mr. Hu alleged in his complaint that "Mr. Zambuto systematically used the employee performance evaluation as a tool to discriminate against [him] because of [his] protected activities . . .. (Cl. Ex. A Enclosure 1).

I find that Mr. Hu's reference to 10 C.F.R. §50.7(b) and his allegation of discrimination based on protected activities were sufficient to alert the DOL that Mr. Hu's complaint alleged a violation of the whistleblower provision of the Energy Reorganization Act. Because the whistleblower provision of the ERA is within the DOL's jurisdiction, and Title VII claims are not, the DOL should have only transferred the portion of Mr. Hu's complaint that alleged a violation of Title VII, rather than his entire complaint which included an alleged violation of the ERA. Accordingly, I conclude that Mr. Hu has filed a timely complaint of discrimination under the ERA. I find no merit in PSE & G's argument that Mr. Hu abandoned his claim.

APPLICABLE LAW

On October 24, 1992 the Comprehensive National Energy Policy Act was signed into law making several amendments to the whistleblower provision of the ERA. P.L. 102-486, 106 Stat.

2776. Because the new law only governs complaints filed on or after its enactment, the law applicable to this case is the law that was in effect prior to the 1992 amendment. *See* §2902(i) of P.L. 102-486.

Section 210 of the Energy Reorganization Act of 1974, 42 U.S.C. §5851, provides:

> (a) Discrimination against employee
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> No employer, including a Commission licensee, an applicant for a Commission license, or a contractor or a subcontractor of a Commission licensee or applicant, may discharge any employee or otherwise discriminate against any

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employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)--

> (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C. §2011 *et seq*.], or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;
>
> (2) testified or is about to testify in any such proceeding or;
>
> (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C. §2011 *et seq*.].

In this case, it is conceded that PSE & G is subject to the Act. (Tr. at 19). Complainant relies on §5851(a)(3).

The Secretary of Labor set forth general principles relating to the allocation of burdens and order of presentation of proof to apply in retaliatory adverse action cases arising under the ERA and related statutes in *Dartey v. Zack Comp. of Chicago*, Case No. 82-ERA-2, Secretary's Decision and Final Order issued April 25, 1983. *See* 29 C.F.R. Part 24. The complaining employee must initially present a *prima facie* case by showing that (1) he engaged in protected activity, (2) the employer was aware of such activity, and (3) the employer took adverse action against him. *Dartey* at 7. The employee must additionally present evidence sufficient to raise the inference that (4) his protected activity was the likely reason for the adverse action. *Cohen v. Fred Meyer, Inc.*, 686 F.2d 793, 796 (9th Cir. 1982). Evidence that the employer was aware that the employee had engaged in the protected

activity is essential to a causal link. *Id.* Furthermore, temporal proximity between the protected activity and the adverse action may be sufficient to raise the inference that the protected activity was the motivation for the adverse action. *Nichols v. Bechtel Constr., Inc.*, Case No. 87-ERA-0044, Secretary's Decision and Final Order issued Oct. 26, 1992, slip op. at 12. By establishing a *prima facie* case, the employee is entitled to a presumption of discriminatory treatment, because

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employer's "acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254-255 (1981).

A claimant does not have to engage in a formal proceeding in order to invoke the protection of the Act. *Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505, 1512 (10th Cir. 1985). Moreover, the fact that an employee may be mistaken as to whether the employer's actions actually violated the statute is not dispositive of the issue of whether the employee engaged in protected activity, since "internal complaints regarding safety or quality problems," *Mackowiak v. Univ. Nuclear Sys., Inc.*, 735 F.2d 1159, 1162 (9th Cir. 1984), as well as "possible violations," *Kansas Gas & Elec. Co.*, 780 F.2d at 1512, are considered protected activity.

If the complainant obtains a presumption of discriminatory treatment by establishing a *prima facie* case, then the employer bears the burden of producing an explanation to rebut the *prima facie* case, i.e., the burden of "producing evidence" that the adverse employment actions were taken "for a legitimate, nondiscriminatory reason." *St. Mary's Honor Ctr. v. Hicks*, 113 S.Ct. 2742, 2747, _ U.S. _ (1993) (quoting *Burdine*, 450 U.S. at 254). Significantly, the employer bears only a burden of producing evidence at this point. The employer must introduce evidence setting forth reasons for its actions which would support a finding that unlawful discrimination was not the cause of the employment action. *St. Mary's*, 113 S.Ct. at 2747. If the employer carries this burden of production, the presumption of retaliatory action raised by the *prima facie* case is rebutted, and drops from the case. *St. Mary's*, 113 S.Ct. at 2747 (citing *Burdine*, 450 U.S. at 255).

It is important to keep in mind that even though the presumption of retaliatory action shifts the burden of production to the defendant, "the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *St. Mary's*, 113 S.Ct. at 2747.

DISCUSSION

Mr. Hu contends that PSE & G took adverse employment actions against him in retaliation of his engaging in protected

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activities. Mr. Hu argues that the concerns he raised with his superiors are protected under the ERA because they relate to the quality and safety of the simulator. (Tr. at 60). Mr. Hu testified that his protected activity consisted of suggestions to Mr. Huth and Mr. Zambuto that PSE & G needed to "clean-up" the existing code and documentation (Cl. Ex. A), needed more complete documentation, and needed more sophisticated software models. (Cl. Ex. 1). Mr. Hu testified that his act of showing Mr. Huth a document written by Argonne National Laboratory called "Dynamic Simulator for Nuclear Power Plant" is also protected under the ERA because Mr. Hu used it as an example of how he thought PSE & G should be run. (Tr. at 65-66, Cl. Ex. A). Mr. Hu asserts that his suggestion to his superiors that PSE & G hire at least one nuclear engineer, computer engineer, mechanical engineer, control engineer, and hydraulic engineer is also protected activity. (Tr. at 163, Cl. Ex. A Enclosure 1). Mr. Hu contends that as a result of his engaging in these protected activities, PSE & G retaliated against him by placing him in a PIP (Tr. at 158), rejecting his request to attend a computer training seminar (Tr. at 172-173), denying him a salary increase (Tr. at 200-201), and finally terminating his employment.

On July 12, 1991, Mr. Hu notified the NRC about his alleged protected activities. Because Mr. Hu's correspondence with the NRC occurred after he was terminated, it is irrelevant to Mr. Hu's present claim. (Tr. at 26-27, Cl. Ex. A Enclosure 20).

PSE & G asserts that Mr. Hu made general and vague statements about the computer code, which do not constitute protected activities, but rather were consistent with a software engineer's job. PSE & G further claims that all of the adverse employment actions taken against Mr. Hu were for legitimate business reasons, and were not related, in any way, to Mr. Hu's alleged protected activities.

I need not address the issue of whether or not Mr. Hu has established a *prima facie* case of discrimination because I am convinced that Mr. Hu has not sustained his ultimate burden of proving, by a preponderance of the evidence, that PSE & G intentionally discriminated against him because he engaged in protected activities. *St. Mary's*, 113 S.Ct. at 2747. On the contrary, PSE & G has produced convincing evidence that all the adverse employment actions that Mr. Hu complains of were for legitimate business reasons.

There is an abundance of credible evidence that Mr. Hu's supervisors and colleagues were dissatisfied with his work from the first few months of his employment. Mr. Nguyen, the lead

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software engineer, who reviewed Mr. Hu's performance for approximately four months at the Salem Simulator, testified that Mr. Hu was unable to utilize a basic modeling technique in

simulation. (Tr. at 475-476). Mr. Nguyen testified that Mr. Hu could not absorb the training material necessary to do his work, and lacked the professional ability to do his job. (Tr. at 469-474). Mr. Zambuto testified that he transferred Mr. Hu from the Salem Simulator to the Hope Creek Simulator because of Mr. Nguyen's poor evaluation of Mr. Hu, because he saw a level of frustration on Mr. Hu's part in terms of not getting the jobs done that he was required to get done (Tr. at 328), and because Mr. Zambuto believed that the documentation at the Hope Creek Simulator would be easier for Mr. Hu to understand. (Tr. at 253-254, 328-329). Mr. Mecchi, the principal trainer for operations, agreed with Mr. Zambuto that the slower pace of activities at the Hope Creek Simulator would afford Mr. Hu an opportunity to grow and mature in his responsibilities. (Tr. at 329).

I also credit the testimony of Mr. Huth, the lead software engineer at the Hope Creek Simulator. Mr. Huth, who was not involved in the decision to terminate Mr. Hu (Tr. at 425), testified that in March 1990 he realized that Mr. Hu's performance was not up to standard and that he was spending too much time helping Mr. Hu. (Tr. at 413). As a result of Mr. Huth's observation, Mr. Zambuto decided to monitor Mr. Hu in order to "get a grasp of his time management," and to give Mr. Hu a chance for self-assessment. (Tr. at 368). Weekly and bi-weekly assessment sheets were provided to Mr. Hu as an opportunity for him to evaluate his own performance, as well as to provide him a means for feedback. (Tr. at 367-368). From March 1990, until his termination, Mr. Hu received numerous poor evaluations. (R. Ex. 19).

Mr. Hu's colleagues were also dissatisfied with his work. Mr. Carter, who worked with Mr. Hu on a system upgrade work package, concluded that Mr. Hu's work was "not even marginally satisfactory." (Tr. at 492, R. Ex. 19). Similarly, Mr. Shaffer, who also worked with Mr. Hu on a number of work packages concluded that Mr. Hu's work was far inferior in comparison to the other software engineers that he has previously worked with. (Tr. at 500-506).

As a result of all of these poor performance reports, Mr. Hu was notified that he was assigned to a six-month performance improvement plan. Mr. Hu's testimony that the PIP was PSE & G's way to "legitimize the discrimination process," (Tr. at 167), is

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unsubstantiated. I find that the PIP was a legitimate business decision motivated solely by Mr. Hu's sub-standard work performance, and was implemented to test, evaluate, and hopefully improve Mr. Hu's performance. I give great weight to the evidence that indicates that Mr. Hu had a history of poor performance reports long before the PIP was implemented, because several PSE & G employees that testified to rating Mr. Hu's performance below standard were *not* the employees that were aware of Mr. Hu's alleged protected activities, nor were they the employees involved in the decision to implement the PIP. Because of Mr. Hu's poor performance reports, Mr. Mecchi and Mr.

Zambuto met with PSE & G's Human Resources Department to put together a PIP for Mr. Hu. (Tr. at 259). Ms. Probisi, the employee relations coordinator in the Human Resources Department of PSE & G explained that the Human Resources Department assists other departments in formulating PIP's when an employee's performance becomes unsatisfactory. (Tr. at 439). Ms. Probisi testified that PIP's have been used by PSE & G for over five years and are a routine measure used to help employees. (Tr. at 440). After reviewing Mr. Hu's file, Ms. Probisi verified that a PIP was appropriate in his situation, and that the specific PIP that was implemented for Mr. Hu was consistent with the objectives of a performance plan. (Tr. at 442-443).

Mr. Mecchi testified that the first time Mr. Hu raised an issue regarding his alleged protected activity was at the panel meeting held on January 11, 1991, four months *after* Mr. Hu began the PIP. (Tr. at 262-263). Similarly, Mr. Zambuto testified that the first time Mr. Hu expressed concerns about his alleged protected activity in "a little more formal way" was at this panel meeting. (Tr. at 318). Mr. Huth, who also attended the January 11, 1991 panel meeting, testified that Mr. Hu deflected the comments that were made about his poor work performance by questioning other aspects of the program. (Tr. at 424). In sum, Mr. Hu has not proven the causation element of his claim that the PIP was motivated in retaliation of his engaging in protected activities.

I also find that it was a legitimate business decision not to send Mr. Hu to Florida for advanced computer training. I credit Mr. Zambuto's testimony that the courses that were offered were rudimentary training courses in FORTRAN, which were too elementary for Mr. Hu, who had ten years of experience working in FORTRAN. (Tr. at 336). I also credit Mr. Zambuto's testimony that Mr. Hu was not considered for any of the more advanced courses that were offered because of where he was in his development. Furthermore, PSE & G's policy of only sending a few

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employees to off-site training due to budgetary concerns is legitimate. I am especially persuaded by Mr. Zambuto's testimony regarding the training Mr. Hu received. Mr. Zambuto testified that when employees are hired they fill out a management personnel inventory, which is a tool by which an employee has an opportunity to express his desires, goals, and perceived career paths. (Tr. at 337-338). On Mr. Hu's inventory, he specified a desire to attend five training courses. (R. Ex. 3). Mr. Hu attended all of the courses on his list with the exception of one training course, which was no longer applicable to Mr. Hu's job because he transferred to the Hope Creek Simulator. (R. Ex. 3, Tr. at 338-341, 137-141). Mr. Hu corroborated Mr. Zambuto's testimony by admitting that with the exception of the one course that he was complaining about, he attended all the other programs he requested, as well as numerous others. (Tr. at 141-145).

I find that Mr. Hu has not proven that PSE & G's denying him a salary increase was motivated in retaliation of his engaging in

protected activities. Mr. Hu's only evidence in support of his assertion that he was denied a salary increase in retaliation of his protected activities is his own testimony of temporal proximity between the panel meeting and receiving notice that he would not get a salary increase. Temporal proximity may be used to prove causation, however under the circumstances in this case that argument is not persuasive. As discussed above, the purpose of the panel meeting was to discuss the fact that Mr. Hu's work performance was still below standard, even after being in a PIP for four months. Additionally, there is strong testimony by Mr. Mecchi and Mr. Huth that Mr. Hu raised his alleged protected activities at the panel meeting instead of addressing the comments that were made about his poor work performance.

Finally, the fact that none of Mr. Hu's testimony concerning the alleged discrimination was corroborated, and the fact that Mr. Hu adduced several grounds of discrimination do not add persuasion to his case. In order to believe Mr. Hu, I would have to reject the testimony of all the PSE & G employees. Although Mr. Hu possesses excellent academic credentials, working as a simulator software engineer at PSE & G simply did not work out.

In conclusion, I find that PSE & G has articulated legitimate, nondiscriminatory reasons for taking adverse employment actions against Mr. Hu. Accordingly, assuming *arguendo* that Mr. Hu has made a *prima facie* case, PSE & G has rebutted the presumption of retaliatory action. I find no evidence of pretext or dual motive. Furthermore, Mr. Hu has not sustained his ultimate burden of proving that his allegedly

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protected activity motivated, in whole or in part, PSE & G's decision to take any of the adverse employment actions he experienced. The weight of the evidence in the record indicates that Mr. Hu was terminated from PSE & G for legitimate business reasons.

RECOMMENDED ORDER

Mr. Hu's claim of discrimination under §210 of the ERA is dismissed.

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NICODEMO DE GREGORIO
Administrative Law Judge

NDG/JB/sjn

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Secretary of Labor to the Office of Administrative Appeals, U.S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Ave., N.W., Washington, D.C. 20210. The Office of Administrative Appeals has the responsibility to advise and assist the Secretary in the preparation and issuance of final decisions in employee protection cases adjudicated under the regulations at 29 C.F.R. Parts 24 and 1978. *See* 55 Fed. Reg. 13250 (1990).

SERVICE SHEET

Case Name: Teh K. Hu v. Public Service Electric & Gas Company

Case No.: 93-ERA-38

[PAGE 15]
Title of Document: Recommended Decision and Order

I, Sheila Joyce Neal certify that on December 8, 1993, a copy of the order was mailed to the last known address of each of the following parties and their representatives.

_____
Sheila Joyce Neal
Legal Technician

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December 8, 1993

MEMORANDUM TO: Robert B. Reich
Secretary of Labor

FROM : Nicodemo De Gregorio
Administrative Law Judge

SUBJECT : Teh K. Hu v. Public Service Electric & Gas Company
Case No.: 93-ERA-38

On December 18, 1993 a Recommended Decision and Order in the Teh K. Hu v. Public Service Electric & Gas Company, Case No. 93-ERA-38, was transmitted to your office. We are hereby forwarding three letters from Mr. Hu that were received after the issue of the Decision and Order.

Please associate this with the case record.

Sincerely yours,

Sheila Joyce Neal
Legal Technician
for Judge De Gregorio